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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE Plaintiff and Respondent, v. KENNETH D. PERSON, Defendant and Appellant.	A122200 (Napa County Super. Ct. No. CR 136959)

Defendant and appellant Kenneth D. Person appeals from a final judgment of conviction after jury trial related to the possession and sale of methamphetamine, arguing for reversal on the grounds of ineffective assistance of counsel and prosecutorial misconduct. We affirm the judgment.

BACKGROUND

On November 14, 2007, the Napa County District Attorney filed an information charging defendant with three counts for: possession for sale of methamphetamine in violation of Health and Safety Code section 11378, possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a), and possession of drug paraphernalia in violation of Health and Safety Code section 11364. The information also alleged as enhancements that defendant had two prior convictions for possession of a controlled substance for sale and had served two prior prison terms.

After the court's initial granting of a motion to suppress and the district attorney's dismissal and refilling of charges, defendant moved to suppress certain drug evidence seized in a warrantless search of his home office, which motion was denied. Defendant renewed his motion to suppress, which was also denied.[1]

A jury trial followed. The jury convicted defendant of all three counts, and defendant admitted the prior conviction allegations and prison term enhancements. The court imposed a sentence that required defendant to serve a total of three years in prison. Defendant filed a timely notice of appeal.

DISCUSSION

I. *Ineffective Assistance of Counsel*

Defendant first argues that his conviction must be reversed because he received ineffective assistance of counsel. According to defendant, his trial counsel, although he moved to suppress the drug evidence seized at defendant's home, should have specifically argued that the search exceeded the scope of the search consent provided by defendant's girlfriend, Kathyrn Hippauf, but did not. This argument is without merit.

A. *The Proceedings Below*

Napa County Deputy Sheriff Patrick McMahon testified that on June 10, 2007, he stopped a vehicle in Napa driven by Hippauf, based on a traffic violation and expired registration. McMahon searched the vehicle. He found a Ziploc baggie containing a white crystalline substance that he believed was methamphetamine and an open bottle of liquor. When he asked Hippauf where she got the substance he believed to be methamphetamine, she said that she "grabbed some of it from home[.]" McMahon asked whether she had more at her home, and Hippauf said that she used a piece of "granite" that she kept in a master bedroom closet to divide and ingest methamphetamine. McMahon asked Hippauf for her consent to search her home. He gave her a form that, if

[1] Defendant petitioned this court for a writ of prohibition, which we denied.

she executed it, would grant the sheriff's department permission to search her home, and explained it and her rights to her, including her right to refuse consent to the search.

Hippauf signed the form "saying she was giving permission to search her house." She testified that she consented to the search of her car and home because she had "no choice," since she thought she was going to jail if she did not sign the consent form. She signed it believing that it granted permission to search for the square piece that she had discussed with Person, and did not realize until later that she had signed a consent to search her whole house. She testified that she "skimmed over" the form, and that "at the time, I, I don't think it really registered that it was for the whole house. I was under the assumption it was for my room because that's what we had talked about." There was no evidence presented that she discussed such an assumption with anyone before signing the form or before the subsequent search of her home.

McMahon testified that Hippauf voluntarily drove with him to her house and remained outside while McMahon and another deputy sheriff knocked on the front door and, upon the door being opened by a young man, entered the house. They encountered two other young men in the home; all three young men waited outside at the deputies' instructions while the deputies walked through the house and into the attached garage.

McMahon found defendant sitting at a computer desk in an office area at the front of the garage. After defendant went outside at McMahon's instruction, the deputies found a piece of granite in a master bedroom closet, upon which were a small, unusable amount of methamphetamine, a razor blade, and straw.

McMahon testified that the deputies also searched the common areas of the house and the office garage area. In the office garage area, McMahon saw in plain view a propane torch next to the computer desk where defendant had been sitting, and a bottle of propane. In McMahon's experience, such torches were used as a heat source for smoking methamphetamine. Above the propane torch, on a shelving unit, McMahon found a box, in which he discovered, among other things, a wad of money totaling $475, a plastic bag

containing white crystals (which he later learned weighed 2.8 grams), a glass pipe, and two electronic scales.

B. *Analysis*

Defendant has the burden of proving the inadequacy of his trial counsel. (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) Defendant must establish both that no reasonably competent attorney would have engaged in the conduct complained of, and that he was prejudiced by this conduct. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Cleveland* (2004) 32 Cal.4th 704, 746.)

Furthermore, to prevail on a direct appeal, rather than by petition for a writ of habeas corpus, defendant must establish his counsel's ineffectiveness based on the appellate record. (*People v. Babbitt, supra*, at p. 707; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*).) " 'Counsel has no duty to make his client happy by interposing useless suppression motions.' [Citation.] Moreover, '[a] defense counsel is not required to make futile motions or to indulge in idle acts to appear competent.' [Citation.] Reversal of convictions on the ground of inadequate counsel is mandated only if the record affirmatively reveals no rational tactical purpose for his or her act or omission." (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1252-1253.)

Defendant argued before the trial court that the evidence should be suppressed because Hippauf's consent to search the home did not justify a warrantless search in light of defendant's purported denial of consent. On appeal he argues that there was a separate ground for suppression of the evidence: "that the officers' search of the residence unreasonably exceeded the scope of Ms. Hippauf's consent," which "was potentially meritorious and thus dispositive as regards the charges against [defendant]."

The People first argue that defendant's claim must be denied because he has submitted an insufficient record for review of his claim. We agree. In *Mendoza Tello, supra*, 15 Cal.4th 264, our Supreme Court reversed the appellate court's holding that a trial counsel's failure to move to suppress certain evidence constituted ineffective

assistance of counsel. The court noted that the record on appeal did not indicate what testimony would have been provided by the deputy sheriff at a suppression hearing, or "why he did what he did." (*Id*. at p. 267.) The court stated that the deputy might have had a good reason for his actions, and that the defense counsel might have been aware of it. (*Ibid*.) Under such circumstances, "[a]n appellate court should not declare that a police officer acted unlawfully, suppress relevant evidence, set aside a jury verdict, and brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed and the police and prosecution had a full opportunity to defend the admissibility of the evidence." (*Ibid*.)

We have no such confidence in this case because the issue of the scope of Hippauf's consent was not litigated in the trial court. As a result, the record does not include what McMahon would have said if he had been asked about the scope of Hippauf's consent, nor does it contain the actual form Hippauf signed. Thus, defendant's arguments on appeal are based only on the testimony at trial. It is defendant's obligation to show ineffective assistance of counsel based on appellate record, and he fails to do so. We reject his appellate claim for this reason alone.

Even if we were to consider the merits of his ineffective assistance of counsel claim, it is utterly unpersuasive. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (*Florida v. Jimeno* (1991) 500 U.S. 248, 251.) " 'Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of the circumstances.' " (*People v. $48,715 United States Currency* (1997) 58 Cal.App.4th 1507, 1515.) McMahon testified that Hippauf told him that the substance he had found in her vehicle came from her home. The parties do not contest that Hippauf signed a general consent form granting permission to search her residence, or that McMahon proceeded with that understanding. Regardless of Hippauf's testimony that

she "assumed" her consent was more limited, there is no indication that she expressed this view to anyone at the time. Therefore, the evidence in the record before us strongly indicates that an objectively reasonable person would have understood that Hippauf had agreed to a search of her entire home.

Defendant argues that the focus of Hippauf's conversation with McMahon was on the piece of granite in the master bedroom closet, and that a reasonable person would have believed her consent to the search was limited to that bedroom. This makes little sense in light of the totality of the circumstances. Hippauf did not indicate that methamphetamine would be found only in her bedroom, nor does it make sense that she would think McMahon would limit his search to the piece of granite.

In any event, regardless of the ultimate merits of defendant's argument, there can be no question that a competent attorney could reasonably believe that a motion based on a challenge to the scope of Hippauf's consent would be futile in light of the uncontested scope of the consent form that she executed and McMahon's testimony. Defendant's ineffective assistance of counsel claim is without merit.[2]

II. *Prosecutorial Misconduct*

Defendant also argues that the prosecutor engaged in prejudicial misconduct by purportedly misstating the evidence during closing argument. We agree with the People that this argument has no merit as well. We also reject defendant's contention that his trial counsel's failure to object to the prosecutor's comment constituted ineffective assistance of counsel.

[2] In light of our ruling, we do not address the other arguments made by the parties, such as whether defendant's claim that the deputies acted beyond the scope of consent was properly preserved for appeal, or defendant's contention that the ineffective assistance of counsel supposedly provided was prejudicial.

A. ***The Proceedings Below***

Defendant contested that he possessed any methamphetamine for sale. He testified that he had used methamphetamine for ten to 15 years, and was consuming about .25 grams a day at the time of his arrest. He also testified that he lived with Hippauf, and that he shared the rent with Hippauf and their sons, paying the rent in cash.

McMahon testified that when he interviewed defendant after searching his home, defendant had said that McMahon probably had found a bag containing methamphetamine that was for defendant's personal use, defendant's portion of the rent money, a pipe, and a scale. He told McMahon that that he had just purchased an "eight ball" of methamphetamine – approximately 3.5 grams – three days before; that he sold half of this "eight ball" to someone else and that he personally used about a quarter of what was left (which McMahon thought was inconsistent with the 2.8 grams contained in the baggie); and that the cash in the box was money he had earned working at a winery. McMahon testified that defendant also told him that he used the scales when he bought drugs to make sure he received the right amount. Defendant did not appear to be under the influence of anything.

McMahon further testified that, based on the amount of methamphetamine found in defendant's garage office, which McMahon considered to be a "significant amount," and the other items found, he believed that defendant possessed the methamphetamine for sale. He testified regarding the typical dosage of an average user, and how many doses could be derived from the amount that defendant had claimed to purchase, and that an individual usage of .25 grams of methamphetamine was at the "high end." He stated: "That would be the high end user, that is the person who has no teeth, sores all over their face . . . [T]heir skin is . . . jaundiced and that's the picture when you hear the preverbal [*sic*] tweaker or cranker, that's the picture like in the dictionary definition."

McMahon was asked whether one could determine the amount and length of methamphetamine use by a person's appearance. He said: "I would hesitate to claim

that. But there is some truth to it because . . . the people who have the teeth falling out, the meth sores which they call ephedrine bugs or meth monsters. . . . [T]here could be natural causes for that, too. [¶] So I would hesitate to just specifically target a person because of the way they look, but when you get into a little bit of their history in that they are meth users, I think you can gage [*sic*] it a little bit, yeah."

The defense then objected to the prosecutor's question to McMahon, "If I modify the question to say, you could tell if someone was at the extreme end?" Defendant contended this was improper medical opinion testimony, and the court sustained the objection. The prosecutor subsequently elicited McMahon's testimony that defendant did not look any different at trial than he had at the time he was arrested.

At closing argument, the prosecutor asserted that the key contention was whether defendant possessed "the meth that was found in the garage to sell it." The prosecutor stated: "There was . . . in total . . . about 3.36 grams of meth. You heard Deputy McMahon talk to you about that. How the uses go from a range of . . . normal being .05 grams to . . . up to .25 grams as an extreme use. And he talked to you about . . . people using that amount. People we see with physical signs of meth use."

Defense counsel did not object to this statement.

B. *Analysis*

According to defendant, the prosecutor's statement constituted reversible error because it misrepresented the content of McMahon's testimony. Defendant argues that, while McMahon testified that a person who regularly ingested a dose of .25 grams of methamphetamine would be a "high-end user," without teeth and with sores on their face, the prosecutor inferred that McMahon had testified that one could generally judge a user's dosage based on his physical appearance, when McMahon had declined to make such a statement. We reject this argument for two reasons.

First, as the People argue, defendant has forfeited his appellate claim by failing to object below and request a curative instruction or admonition, which we conclude would

have cured any harm caused by the prosecutor's relatively brief comment, assuming for the sake of argument that it was improper. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.)

Second, as the People also argue, there was no misconduct. It is " ' "well established . . . [that] ' "[a] prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) However, it is also well-settled that " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819.) " ' "The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury." ' " (*People v. Beivelman* (1968) 70 Cal.2d 60, 76-77.)

The prosecutor's brief statement that one may see "physical signs" when a person engages in "extreme use" of methamphetamine was sufficiently supported by McMahon's testimony so as not to constitute prosecutorial misconduct. McMahon, although he was hesitant to rely on appearance alone to conclude that a person was a heavy methamphetamine user because physical characteristics could be the result of "natural causes," *did* testify that, if there was a history of methamphetamine use, such characteristics could indicate heavy methamphetamine use. The prosecutor's statement was based on a reasonable inference, given this testimony.

Given that we conclude that the prosecutor did not engage in misconduct, we also reject defendant's contention that his counsel provided ineffective assistance of counsel by failing to object to the prosecutor's statement.[3]

DISPOSITION

The judgment is affirmed.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.

[3] Given our ruling, we also have no need to address the parties' other arguments, including regarding whether any misconduct was prejudicial.